Supreme Court, U.S.
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No. 99-1960

IN THE

Supreme Court of the United States

ENRIQUE MARUGÁN GIRÓ,

Petitioner,

v.

BANCO ESPAÑOL DE CRÉDITO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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THE COURT SHOULD GRANT THIS PETITION IN ORDER TO ADDRESS WHETHER RICO IS AVAILABLE TO INTENDED VICTIMS OF RACKETEERING WHO SUFFER INTENDED INJURIES IN THE UNITED STATES, BUT WHERE THE RACKETEERING CONDUCT OCCURS SUBSTANTIALLY OUTSIDE THIS COUNTRY.

Petitioner recognizes that the question presented for this Court's consideration involves the proximate cause analysis applied by the Second Circuit in the instant case, not the extraterritorial application of RICO. Although Respondent continues to argue that RICO has no extraterritorial application, both the Second Circuit and the District Court rejected this statement of the law. Significantly, however, extraterritorial conduct was a factor in the Second Circuit's proximate cause analysis.

Specifically, for the Second Circuit, the fact that substantial racketeering conduct occurred in Spain, far from the resulting injury in New York, outweighed the fact that the conspirators intended to injure Mr. Marugán in New York and took a series of steps to make this happen. The Second Circuit presumably intended its decision to be a direct application of this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Petitioner respectfully submits that such a strict proximate cause inquiry violates the spirit, and, frankly, the express holding of *Holmes*, and the Congressional intent behind civil RICO.

This Court should reject Respondent's argument that because the Second Circuit's decision is unpublished, it is, consequently, of no significance. To the contrary, it is significant, not only because it prevents the instant victim

of racketeering from suing for his injuries, but because it is capable of repetition as long as there is no Supreme Court decision which addresses RICO's proximate cause requirement as it applies to foreigners who suffer racketeering injury in the United States.

The spirit of *Holmes* is best expressed in the following passage, in which this Court quotes from *Prosser and Keeton on Law of Torts*:

> At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient."

503 U.S. at 268 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984)). While applying proximate cause criteria, this Court never lost sight of RICO's remedial purpose, noting that the conspirators would not go unpunished, despite its holding in the matter at hand, because the proper plaintiffs had already sued them. *Id.* at 273.

Here, not only is Mr. Marugán the proper plaintiff, he is the only plaintiff who can sue for these injuries. The Bank's racketeering conduct should not go unpunished, simply because the majority of it occurred overseas. In addition, the instant lawsuit is "administratively possible and convenient." There is no other person more directly injured by the Bank's racketeering conduct than Mr. Marugán and the amount of damages, consisting predominantly of lost profits in New York real estate, is easily ascertainable. Further, the Bank has legal counsel and a branch office in New York, the situs of the lawsuit, and, thus, an action there is convenient. Finally, neither Mr. Marugán, nor the *defunct* corporations, which existed solely to hold the real estate, are able to sue in Spain for these injuries.

In sum, the Court should hear this case because justice demands that the intended victim of racketeering, even a non-United States citizen, who suffered the intended injury in the United States, should be able to invoke civil RICO in United States' courts, notwithstanding that the intended harm took time and effort to obtain.

Respectfully submitted,

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